Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States
October Term, 1995

LAMOND SYKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Fifth Amendment of the United States Constitution, privilege against self-incrimination, apply in civil forfeiture proceedings?

II. Does jeopardy attach to a civil forfeiture proceeding, when defendant does not file a claim of interest in the property subject to forfeiture but where a final disposition order or declaration of forfeiture is entered?

III. Should jeopardy attach in a pending forfeiture proceeding and bar any subsequent criminal prosecution for the same offense, when defendant places himself at risk of determination of guilt by contesting the forfeiture of his property but no final disposition order has been entered?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

CONCLUSIONS 13

TABLE OF AUTHORITIES

CASES CITED Page

Arizona v. Washington, 434 U.S. 497 (1978).....11, 12
Austin v. United States, 590 U.S. ___, 125 L.Ed.2d 488,
113 S.Ct. ___ (1993);.....7, 8
Boyd v. United States, 116 U.S. 619 (1886).....6
Downum v. United States, 372 U.S. 734 (1963).....12
Gainer v. United States, 904 F. Supp. 1234
(Dist. of Kansas 1995).....9
Garrity v. New Jersey, 385 U.S. 493 (1967).....6
Marchetti v. United States, 390 U.S. 39 (1968).....6
Montana Department of Revenue v. Kurth Ranch,
517 U.S. ___, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).....7
Serfass v. United States, 420 U.S. 377 (1975).....11
United States v. Aquilar, 886 F.Supp 740 (ED Wash. 1994).....9
United States v. Brophil, 899 F. Supp 1257 (D. Vt. 1995).....9
United States v. $405,089.23 U.S. Currency, 33 F.3d 1210
(9th Cir. 1994).....8, 12
United States v. Real Property Located at Incline Village,
47 F.3d 1511 (9th Cir. 1995).....9
United States v. Sanchez-Cobarruvais, 65 F.3d 781
(9th Cir. 1995).....10
United States v. Torres, 28 F.3d 1463 (7th Cir. 1994).....11
United States v. U.S. Coin & Currency, 401 U.S. 715 (1971)....7
United States v. Ursery, 59 F.3d 568 (6th Cir. 1995)..... 9,11
United States v. Ward, 484 U.S. 242 (1980).....6
United States v. Whitby, 896 F. Supp 898 (Wd Wisc. 1995).....9

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lamond Sykes, respectfully requests that a Writ of Certiorari be issued to review the order of the United States Court of Appeals for the Eighth Circuit entered on January 9, 1996 and the subsequent deniel of the Petition for Re-Hearing on February 7, 1996.

OPINIONS BELOW

The United States District Court Eastern District of Missouri denied Petitioner's Motion to Dismiss the Indictment on Double Jeopardy Grounds, which he asserted violated his constitutional right to be free from multiple punishment for the same offenses under the Fifth Amendment for the United States Constitution. (App. 5A). On January 9, 1996, the United States Court of Appeals for the

Eighth Circuit affirmed that decision and held that jeopardy did not attach to the completed forfeitures because Petitioner did not contest the forfeitures; nor had he been subjected to prior jeopardy in the pending forfeiture proceedings. (App. 1A). The United States Court of Appeals for the Eighth Circuit denied Petitioner's petition for re-hearing on February 7, 1996, (App. 8A).

JURISDICTION

Judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 9, 1996, and petition for re-hearing was denied on February 7, 1996. This court's jurisdiction to consider this petition from the judgment entered by the United States Court of Appeals, Eighth Circuit, is invoked pursuant to 28 U.S.C. § 1254(1), and is timely filed under Supreme Court Rule 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS

a) Fifth Amendment, United States Constitution:

. . .[N] or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself. . .

b) 18 U.S.C. § 981;

c) 19 U.S.C. § 1608 and § 1609;

d) 21 U.S.C. § 881 (a) (6)

STATEMENT OF THE CASE

Beginning on or about May 22, 1994 and continuing through July 5, 1994, the government seized over $100,000 in U.S. currency, several automobiles and fourteen pieces of industrial dry cleaning equipment, which were owned or in the possession of Petitioner, Lamond Sykes, at the time of seizure and eventual forfeiture.

Pursuant to 19 U.S.C. § 1608, Petitioner received notice of forfeiture, which informed him that in order to receive a judicial determination under federal law he must file a claim and post a bond. The government seized and forfeited Petitioner's assets as follows:

1. A 1994 Jeep Cherokee valued at $32,257, seized pursuant to 21 U.S.C. § 881 (a) (6);

2. $30,000 in U.S. Currency seized pursuant to 21 U.S.C. § 881 (a) (6) as assets used in, or intended to be used in, any manner or part, to commit, or facilitate the commission of, a violation of the Controlled Substance Act, Title 21 of the United States Code;

3. $49,031 in U.S. Currency seized and forfeited pursuant to 21 U.S.C. § 881 (a) (6) as assets used in, or intended to be used in, any manner or part, to commit, or facilitate the commission of, a violation of the Controlled Substance Act, Title 21 of the United States Code;

4. Fourteen pieces of industrial dry cleaning equipment, seized from Petitioner's place of business, and forfeited pursuant to 18 U.S.C. § 981 for violating 31 U.S.C. § 5313 (a) and § 5324, offenses the Petitioner is charged with violating in the pending criminal prosecution;

5. $19,222.96 in U.S. Currency seized from Petitioner's bank accounts and forfeited pursuant to 18 U.S.C. § 981 for violating 18 U.S.C. § 1956, an offense the Petitioner is charged with violating in the pending criminal prosecution.

When Petitioner received notice of forfeiture, the Government was preparing to prosecute him for violations of the Controlled Substance Act, money laundering and making a false statement to an FDIC institution. Petitioner contested only the seizure in Lafayette County, Missouri. In both instances, Petitioner claimed ownership at the time of seizure and denied that these assets were derived from illegal activity. The claim regarding the Jeep Cherokee is pending; the claim regarding the $30,000 has been indefinitely stayed.

The remaining assets - dry cleaning equipment, $19,222.96 in cash and $49,031 in cash -were forfeited pursuant to civil forfeiture proceedings wherein Petitioner filed no claim of interest, nor any answer.

Six months after the seizures and forfeitures, Petitioner was indicted on the same charges the Government used to justify seizure and forfeiture of his assets: (1) conspiracy to distribute heroin and/or cocaine and engaging in a continuing criminal enterprise, both in violation of the Controlled Substance Act, Title 21 of the United States Code; (2) money laundering in violation of 18 U.S.C. § 1956; and (3) making a false statement to an FDIC institution in violation of 31 U.S.C. § 5313 (a) and § 5324.

The civil forfeiture proceedings and pending criminal prosecution were brought in separate proceedings at different times before different district court judges and have resulted or will result in separate judgments. In

Petitioner's motion to dismiss he argued, that continued prosecution for the same offenses in a separate proceeding was inultiple punishment in direct violation of his Fifth Amendment right to be free from double jeopardy, which was denied by the District Court on October 12, 1995.

On appeal, Petitioner asserted that the District Court order, holding that jeopardy had not attached in either forfeiture proceeding was clearly erroneous because the forfeiture statute forced him to choose between two constitutional rights, and the status of the pending forfeiture proceedings were outside of his control. As such, he should not be penalized because no final order has been issued.

The Eighth Circuit ruled that the Double Jeopardy Clause, barring multiple punishment, was not triggered because Petitioner was not a party to the completed proceedings, nor was he subjected to prior jeopardy by the pending forfeitures of the Jeep and $30,000. Thus, Petitioner failed to demonstrate the prerequisite of prior jeopardy, and the judgment of the District Court was affirmed. (App. 1A).

REASONS FOR GRANTING THE WRIT

Petitioner respectfully asserts that the United States Court of Appeals for the Eighth Circuit has decided federal questions in a way that conflicts with applicable decisions of this Court, and other federal circuits.

The United States Court of Appeals for the Eighth Circuit completely overlooked Petitioner's right to assert his Fifth Amendment privilege against self-incrimination in the forfeiture proceedings. As such, its opinion appears inconsistent with this Court's prior decisions.

This Court held that a civil proceeding to forfeit a person's property or assets for an offense against federal law - whether in-rem or in-personam - is considered a criminal matter where the Fifth Amendment privilege against self-incrimination may be asserted. Boyd v. United States, 116 U.S. 619 (1886); United States v. Ward, 448 U.S. 242 (1980). This Court has also held that a defendant should not have to choose between waiving his privilege against self-incrimination, by filing a claim of interest, and remaining silent, thereby giving up any opportunity to prove his interest in the property subject to forfeiture. A statute, requiring an owner of property or a party in interest, to elect between producing a document or forfeiting the asset at issue, is a form of compulsion and in direct violation of the Fifth Amendment privilege against self-incrimination. Garrity v. New Jersey, 385 U.S. 493 (1967).

Moreover, where a statute is a means of self-reporting, it is a form of compulsion raising serious constitutional obstacles and questions about self-incrimination. The standard for applying the self-incrimination privilege is whether the person claiming the privilege is confronted by substantial and real hazards of incrimination. Marchetti

v. United States, 390 U.S. 39 (1968); Montana Department of Revenue v. Kurth Ranch, 517 U.S. _____, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

When the Eighth Circuit denied Petitioner's motion to dismiss the indictment, it failed to consider the compulsory nature of 19 U.S.C. § 1608 and § 1609, as well as the on-going DEA investigation of Petitioner at the time he received notice of forfeiture. (App. 1A). These statutes require Petitioner to file a claim of interest in property allegedly tied to illegal activity, or forfeit the property pursuant to statute. Therefore, the statutes compel Petitioner to choose between two constitutional rights - privilege against self-incrimination and freedom from double jeopardy. The Eighth Circuits' silence condones depriving Petitioner of his Fifth Amendment rights and conflicts with this Court's decisions in Garrity, Marchetti and Kurth Ranch.

In United States v. U.S. Coin and Currency, 401 U.S. 715 (1971) this Court reasoned that, when it is the intent of the forfeiture to impose a penalty upon those significantly involved in a criminal enterprise, it follows from a constitutional standpoint that the Fifth Amendment privilege may properly be invoked. This Court further provided that where money liability is predicated upon a finding of wrongful conduct by the parties, the self-incrimination privilege applies with equal force in both civil and criminal proceedings. Id. at 718.

Furthermore, in Austin v. United States, 509 U.S. _____, 125 L.Ed. 2d 488, 113 S.Ct. _____ (1993) this Court recognized that the Fifth Amendment self-incrimination clause can be applied to civil forfeiture proceedings where the forfeiture statute makes the culpability of the owner relevant or where the owner faced the possibility of subsequent criminal proceedings. In both Kurth

Ranch and Austin, this Court analyzed the double jeopardy issue and its attachment to claimants by focusing on the nature of the sanction and not the process utilized.

Petitioner's assets and property were seized and forfeited pursuant to 21 U.S.C. § 881 (a) (6) and 18 U.S.C. § 981, statutes intended by Congress to serve retributive and/or deterrent purposes. These statutes are punitive in nature, focusing on the wrong-doer whose errant behavior gave rise to the seizure and forfeiture in the first place. The punitive nature of these statutes is evident by the presence of an "innocent owner defense", which serves notice that these non-remedial forfeiture statutes focus exclusively on the culpability of the property owner, not that of the property, and as such are criminal in nature. See, Austin, supra; United States v. $405, 089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994).

By ignoring this Court's decisions in Austin, Kurth Ranch and U.S. Coin & Currency, the Eighth Circuit has placed procedural form over substantive constitutional rights. Its failure to consider the congressional intent and focus of these forfeiture statutes limited its analysis to the proceedings, and not to the conduct of the Petitioner which justified the forfeiture of his property pursuant to federal statute. Therefore, the Eighth Circuit ruling adversely conflicts with applicable decisions of this Court.

II.

There exists conflict and confusion among the federal circuits and district courts on whether jeopardy attaches upon the filing of a declaration of forfeiture in an uncontested forfeiture proceeding. This fact was recognized by the Eighth Circuit in its opinion denying Petitioner's motion to dismiss on double jeopardy grounds. (App. 3A).

Numerous federal circuits and district courts have held that the attachment of jeopardy is not contingent on whether the property owner asserted a claim of interest but on whether a final disposition order has been entered. See, United States v. Ursery, 59 F.3d 568 (6th Cir. 1995) which held that a criminal defendant, who was placed at a risk of a determination of guilt, innocence or of a forfeiture judgment, has been placed in jeopardy, thus triggering double jeopardy protection against subsequent prosecutions. See also, United States v. Real Property Located at Incline Village, 47 F.3d 1511 (9th Cir. 1995) (although defendant did not file a challenge to the civil forfeiture, jeopardy attaches when the government files a declaration of forfeiture or a final disposition of forfeiture); Gainer v. United States, 904 F.Supp. 1234 (Dist. of Kansas 1995) (the character of the act of forfeiture is without question, punishment, whether or not defendant appears as part of the proceeding); United States v. Brophil, 899 F.Supp 1257 (D.Vt. 1995) (failure to appear at a civil forfeiture proceeding does not preclude an individual from raising a double jeopardy claim in a subsequent criminal prosecution); United States v. Whitby, 896 F. Supp 898 (WD Wisc. 1995) (jeopardy attached in a forfeiture proceeding when a default judgement was entered against defendant's property); United

States v. Aquilar, 886 F. Supp 740 (ED Wash 1994) (it is irrelevant whether defendant failed to contest the forfeiture, where the civil forfeiture action was based precisely on the same conduct addressed in the indictment.)

In United States v. Sanchez-Cobarruvais, 65 F. 3d 781 (9th Cir. 1995), the Court held that filing a declaration of forfeiture or final disposition order renders a decision final and bars any subsequent criminal prosecution for the same offense. It further recognized that an administrative declaration of forfeiture under 19 U.S.C. § 1609, has the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in federal district court.

The attachment of jeopardy in an uncontested forfeiture proceeding has not been clearly and concisely adjudicated. The Sixth, Eighth and Ninth Circuits have all supplied a differing opinion and analysis as to when jeopardy is deemed to attach in a civil forfeiture proceeding. As such, this constitutional issue lacks clarity in its application, and needs to be resolved in conjunction with a property owner or interest holder's right under the Fifth Amendment to be free from self-incrimination.

III.

The Eighth Circuit held that the pending forfeiture proceeding, stayed at the request of the government pending the outcome of Petitioner's criminal prosecution, has not subjected Petitioner to prior jeopardy under Serfass v. United States, 420 U.S. 377 (1975).

This Court has held that it is grossly unfair to subject a person to multiple punishment or prosecution, because to do so subjects the individual to increased financial and emotional burdens, prolongs the period a defendant is stigmatized, and enhances the risk that an innocent person may be convicted. Arizona v. Washington, 434 U.S. 497 (1978). The Eighth Circuit's reliance on Serfass is misleading, as this Court's decision therein involved analysis of double jeopardy as it pertains to multiple prosecution, not multiple punishment. Because the Eighth Circuit chose to follow Serfass as authority, it has misapplied Serfass to the facts of this case in holding that the government can stay or stop a forfeiture proceeding where Petitioner has filed a claim, and still conclude that jeopardy had not attached. Application of Serfass in this manner gives the government unbridled power to choose whether or not jeopardy attaches by manipulating the judicial process. It was not the intent of this court that Serfass stand for the proposition that multiple judicial proceedings are a pre-condition to all double jeopardy claims. By following Serfass and its progeny to their logical conclusion, all the Petitioner need do is file a claim of ownership and jeopardy is said to attach.

Moreover, where Petitioner is at risk of a determination of guilt or innocence in a forfeiture proceeding, jeopardy is deemed to have attached. Ursery, supra;

United States v. Torres, 28 F.3d 1463 (7th Cir. 1994). The stay of the forfeiture proceedings does not necessarily result in Petitioner avoiding a risk of determination of guilt, but is a manipulation of the judicial process compromising Petitioner's constitutional rights under the Fifth Amendment, and affords the government additional time to prepare its criminal prosecution of Petitioner.

This court holds that regardless of the completion of a first proceeding, if it is used to afford the prosecution a more favorable opportunity to convict in a subsequent proceeding, it is an example of when jeopardy attaches. Downum v. United States, 372 U.S. 734 (1963); Washington, supra; $405,089.23 U.S. Currency, supra. The Eighth Circuit ruling that the governments' stay prevents the attachment of jeopardy gives the government discretionary power to determine when a defendant's constitutional rights under the Fifth Amendment should be applicable. The Eighth Circuit ignored this Court's holdings in Downum and Washington, by granting the government this power, and as such, its ruling is adverse to applicable decisions, thereby requiring review.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner, Lamond Sykes, respectfully requests that this Honorable Court grant certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3661

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	Appeal from the
	)	United States
vs.	)	District Court for
	)	the Eastern District
LAMOND SYKES, a/k/a Q,	)	of Missouri.
	)	
Appellant.	)	

Submitted: December 12, 1995

Filed: January 9, 1996

Before FAGG, HEANEY, and WOLLMAN, Circuit Judges.
HEANEY, Circuit Judge

Lamond Sykes appeals from the district court's denial of his motion to dismiss an indictment. Sykes contends that the indictment violates the Double Jeopardy Clause of the Fifth Amendment because the government has already punished him by seizing and forfeiting his property for the same offenses. We affirm.

BACKGROUND

Over a several-month period prior to indictment, the government seized the following assets from Sykes:

1. A 1994 Jeep Cherokee valued at $32,257 seized pursuant to 21 U.S.C. § 881 (a) (6);

2. $30,000 in U.S. Currency seized pursuant to 21 U.S.C. § 881 (a) (6);

3. Fourteen pieces of industrial dry cleaning equipment seized from Sykes business pursuant to 19 U.S.C. § 981;

4. $19,222.96 in U.S. Currency seized pursuant to 18 U.S.C. § 981; and

5. $49,031 in U.S. currency seized pursuant to 21 U.S.C. § 881 (a) (6).

Among the five property items, Sykes contested only the forfeiture of the Jeep and the $30,000. The government completed forfeiture against the other three properties in proceedings that were uncontested by Sykes.

Subsequently, the government indicted Sykes for offenses arising from the same conduct that was the basis of the prior seizures and forfeitures. The pending indictment charges him with conspiracy to distribute heroin and cocaine, money laundering, making a false statement to a federally insured financial institution, and engaging in a continuing criminal enterprise. At present, the government has stayed the forfeiture proceedings against the Jeep pending the outcome of the criminal proceeding. The government halted its civil action against the $30,000; the same money is now the subject of a criminal forfeiture count in the indictment.

DISCUSSION

The question presented by this appeal is whether the district court erred in holding that the indictment did not violate the constitutional prohibition against successive punishments for the same offense. We review the district court's denial of the motion to dismiss de novo. United States v. Petty, 62 F.3d 265, 267 (8th Cir. 1995).

The Fifth Amendment provides that "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Although the test of the Amendment mentions only harms to "life or limb", it is well settled that the Double Jeopardy Clause applies to imprisonment and monetary penalties. See, e.g., United States v. Halper, 490 U.S. 435 (1989); Ex parte Lange, 85 U.S. 163, 18 Wall. 163 (1873). The Double Jeopardy Clause protects against a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after a conviction, and multiple punishments for the same offense. Schiro v. Farley, 114 S.Ct. 783, 789 (1994). Sykes asserts that both the prior forfeitures and the pending forfeitures constitute punishment within the meaning of the Double Jeopardy Clause and, therefore, that he cannot be prosecuted for the same offenses which formed the basis of those forfeitures. We disagree.

Before Sykes can invoke the Double Jeopardy Clause to bar this prosecution, he must demonstrate that he has already been subjected to punishment in a prior proceeding. Serfass v. United States, 420 U.S. 377, 393 (1975) ("[It is a] fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy.") With respect to the completed administrative forfeitures, Sykes was not a party to the proceedings; he did not

contest the forfeitures. Under the holding of this court in United States v. Pena, 67 F.3d 153, 155-56 (8th Cir. 1995), Sykes was not placed in jeopardy by those civil proceedings. But see, Gainer v. United States, 1995 WL 675437 (D. Kan. Nov. 8, 1995) and United States v. Brophil, 899 F. Supp. 1257, 1264 (D.Vt. 1995) (holding that failure to appear at a civil forfeiture proceeding does not preclude an individual from raising a double jeopardy claim in a subsequent criminal prosecution.) Nor has Sykes been subjected to prior jeopardy by the pending forfeitures of the Jeep and $30,000. Although Sykes intervened in the proceedings and asserted his ownership of the property, this circuit has held that the government's stay of the forfeiture proceedings prevents the attachment of the jeopardy. United States v. Clemente, 1995 WL 704334, *2 (8th Cir. Dec. 1, 1995) ("Jeopardy does not attach upon the government's mere filing of an administrative claim.")

Sykes fails to demonstrate the prerequisite prior jeopardy. Thus, the indictment does not violate the Double Jeopardy Clause and we affirm the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 4:94CR356
	)	
LAMOND SYKES,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on the motion of defendant Lamond Sykes to dismiss the indictment in this case on double jeopardy grounds. Pursuant to 28 U.S.C. §636 (b), this motion was referred to United States Magistrate Judge Terry I. Adelman. Judge Adelman has filed his Report and Recommendation recommending that the motion to dismiss be denied and defendant has filed timely objections. Defendant argues that continued prosecution of this matter would twice place him in jeopardy in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution because certain items of property were seized from him by the government in forfeiture proceedings.

Five items of property were seized from defendant prior to the prosecution of this case. Those five items, and the types of forfeiture proceedings, are:

1. A 1994 Jeep Cherokee valued at $32,257 seized pursuant to 21 U.S.C. § 881 (a) (6);

2. $30,000 in U.S. Currency seized pursuant to 21 U.S.C. § 881 (a) (6);

3. Fourteen pieces of industrial dry cleaning equipment seized from Sykes business pursuant to 19 U.S.C. § 981;

4. $19,222.96 in U.S. Currency seized pursuant to 18 U.S.C. § 981; and

5. $49,031 in U.S. Currency seized pursuant to 21 U.S.C. § 881 (a) (6).

The first two forfeiture proceedings have not been completed; the forfeiture actions on the last three items were not challenged by defendant.

The Court has conducted a de novo review of all matters relevant to the objections raised by defendant. The Court agrees with the thorough reasoning of Judge Adelman, and believes that his legal conclusion that jeopardy did not attach in any of the forfeiture proceedings is correct. The Court will therefore adopt Judge Adelman's Report and Recommendation as the opinion of this Court, as supplemented herein.

Judge Adelman's Report and Recommendation was issued on October 4, 1995. October 5, 1995, a panel of the Eighth Circuit Court of Appeals rejected a similar double jeopardy challenge based on uncontested state civil forfeiture actions. See, United States v. Pena, No. 94-3750 (8th Cir. October 5, 1995) (slip op.). Judge Adelman, of course, did not consider the Pena opinion as it had not yet been decided at the time of his Report and Recommendation. However, the holding of that case is

squarely in accord with the arguments raised by the government in this case.

Pursuant to the directions contained in United States v. Grabinski, 674 F.2d 677, 679 (8th Cir. 1982), the undersigned further finds that defendant's motion to dismiss this case on double jeopardy grounds is not frivolous. Indeed, until last week, the Eighth Circuit had not considered this issue at all. In the Pena case, the defendant did not properly raise the issue at the trial court level, and the extent of the record, briefing or argument on the issue before the Circuit is not clear. Moreover, in Pena, the forfeiture proceeding was a state proceeding and the Court based its decision, in part, on the dual sovereignty doctrine. This case, of course, involves only federal proceedings, so to the extent the Pena decision was based on the dual sovereignty doctrine, it is distinguishable from this case. Therefore, the Court finds that the defendant's motion on these grounds is not frivolous and presents a colorable defense.

Accordingly,

IT IS HEREBY ORDERED that defendant's objections to the Order and Recommendation of United States Magistrate Judge Terry I. Adelman are overruled.

IT IS FURTHER ORDERED that the Report and Recommendation of United States Magistrate Judge Terry I. Adelman is sustained, adopted, and incorporated herein.

IT IS FURTHER ORDERED that the motion of defendant, Lamond Sykes to dismiss to prevent double jeopardy [#5665] is denied.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3661EMSL

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	Appeal from the
	)	United States
vs.	)	District Court for
	)	the Eastern District
LAMOND SYKES, a/k/a Q,	)	of Missouri.
	)	
Appellant.	)	

The petition for re-hearing filed by the appellant has been considered by the court and is denied.

February 7, 1996